

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 493 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

FOOD CORPN. OF INDIA

Versus

SOLI SHAHPURJI MEHTA

Appearance:

MR SB VAKIL for Petitioners

MR JV DESAI for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 15/10/1999

ORAL JUDGEMENT

1. The appellants in this appeal have challenged the judgement and decree dated 25th October, 1978 passed by the learned City Civil Judge, Ahmedabad in Civil Suit no. 1940/74 whereby the learned Judge partly decreed the suit filed by the respondent by ordering the appellants to pay Rs. 12,771-55 ps. to the respondent with interest at the rate of 6 % per annum on the said amount from the date of suit till realisation of the amount. The

appellants were also ordered to pay proportionate costs of the suit to the respondent.

2. The respondent who is an approved Handling and Transport contractor of the Food Corporation of India, has filed the suit for decree of Rs.15,000/- which includes a sum of Rs. 12,133-70 ps. as the amount remaining due under his final bill dated 27/3/1973, Rs. 1107-85 ps. being the amount deducted from the security deposit, Rs. 1,448-45 ps. being the amount of interest due and Rs.200/- being notice charges. It is the contention of the respondent that he was not liable for the loss in transit while transporting the sugar under the suit contract from Madhi to Food Corporation of India Depots in Gujarat and that even if he were liable for such a loss, the actual loss was not established and, therefore, the appellants could not have withheld any amount remaining due under his final bills.

3. It is the case of the respondent in the plaint that on December 22, 1972, the respondent received a telephone message from the appellant No. 3 asking him to contact the appellant NO.2 at Vadodara for the work of transporting sugar bags. On talking with the appellant NO. 2, the respondent was entrusted with the work of transporting sugar from Madhi Sugar Factory to various Depots of the FCI in Gujarat. It was agreed that the respondent should accept the work at the rate at which the wheat Rabi Crops of previous year was transported. The respondent agreed to these rates. It is the case of the respondent that there was no condition regarding the liability in respect of transit loss on the part of the respondent at the time when the oral agreement was entered into between him and appellant NO. 2, regarding transporting of sugar from Madhi Sugar Factory to various FCI Depots in Gujarat. It is not in dispute that pursuant to the oral agreement the respondent and the appellant NO. 2 commenced the work entrusted to him from December 15, 1972. It is also not in dispute that on December 27, 1972 the respondent wrote a letter to the appellant No. 2 confirming the discussion that took place at Vadodara regarding the work of transporting sugar bags and acceptance of the work at the rate of transporting procured Wheat of Rabi Crop of the previous year. The appellant No. 3 by letter dtd.19/1/1973 conveyed his approval to the appellant NO. 2 regarding transportation of sugar at the said rate of certain terms and conditions and the copy of the letter was also endorsed to the respondent. The respondent also received a communication dated 22/1/1973 from the appellant NO. 2 informing him that the respondent's offer for

transporting the sugar, was accepted, subject to certain terms and conditions. The respondent was called upon to deposit security deposit of Rs.5000/-. The said communication incorporated the condition that all the transit losses were to be borne by the respondent and were recoverable at the current market. It is, however, the case of the respondent that such a condition was never agreed or entered into between the respondent and appellant no. 2 when he was entrusted with the work by the appellant no. 2 and imposing of such condition was not binding to the respondent. It is also the case of the respondent that he was not liable for loss due to natural causes as well as human factors which might have contributed for the loss while the goods were unloaded by the staff of the appellants. It is the case of the respondent that two Truck loads of sugar bags which started from Madhi on 25/2/1972 reached Ahmedabad camp godown on 26/12/1972. On account of the death of a National Leader, a Public Holiday was declared and therefore, two trucks could not be unloaded on that date till 2:00 p.m. While unloading, it was found that the beam scale which was being used while unloading for weighment of sugar was faulty. The respondent represented at the said godown and he, therefore, did not sign the weighment sheets. The respondent vide his letter dtd. 11/1/73 lodged a complaint about the faulty beam scale used by the camp godown staff. The respondent submitted a provisional bill to the defendant on 13/1/73. However provisional bill to the tune of 90% of the amount, after deducting Rs. 5000/- by way of security deposit, was made and amount of Rs.12133-70 ps. was withheld and in stead of making payment of that amount, the appellant No. 2 vide his letter dtd. 30-3-73 informed the respondent that there was a short delivery of sugar to the tune of 3 metric tones 410 kg. and 600 gram and that the respondent was liable to make good this loss at the current market rate of sugar which was from Rs.380/- to Rs.400/- per quintal. It is then contended that after making detailed enquiry, as regards the alleged shortage of sugar, the respondent sent letter dtd. 10th July, 1973 to the appellant NO. 2, wherein it was contended that that shortage of sugar during the transportation was partly due to natural factors and partly due to the fault on the part of the staff of the appellant No. 3. It was also pointed out with particular reference to Ahmedabad camp godown that the sugar bags transported by the respondent and delivered to the said godown, were sent from the said godown subsequently and the weight of the said bags recorded at the time of despatch from the said godown was the same as was found at the time of loading the said bags in truck

at Madhi. It was alleged that shortage at the camp godown at Ahmedabad is shown as 2 tones 249 kg. 500 gram. The respondent demanded the copies of the weighment sheets, but the request was not accorded. The respondent sent reminders for payment of the outstanding amount against his final bill dated 18/7/1973, 25/8/1973, 19/9/1973 and 22/10/1973. The appellant No. 2 vide communication dtd. 9/11/73 informed the respondent that the outstanding amount was adjusted the sugar shortage noticed at various depots and an amount of Rs. 1017-85 ps. still remained to be recovered from the respondent towards the shortage. It is contended that the respondents had admitted the liability to the appellants for the loss of one bag in transit, under letter dtd. 10/7/1973 and had asked the appellant no. 2 to let him know the price of one sugar bag so that the due amount could be remitted by him. Apart from this shortage of one sugar bag, the respondent disowned any liability for the alleged shortage, stating that all the bags delivered by the respondents at various FCI depots were handed over intact and shortage, if any, might have been due to factors beyond the control of the respondent. It is also contended that the sugar bags transported from Ahmedabad camp godown did not show any shortage as compared to their weight when they were loaded from Madhi. The respondent had demanded refund of Rs. 5000/- on 3/12/1973 which was kept as a security deposit. After deducting the amount of Rs. 1,017-85 ps. the remaining amount of Rs. 3982-15 ps. was refunded to the respondent from the security deposit of Rs. 5000/-. The suit was thereafter filed on 1/8/1974 after giving a statutory notice under Sec. 80 of the Civil Procedure Code.

4. The appellant in his written statement Ex. 19 while refuting the claim of the respondent, contended that on 15/12/1972 the FCI was directed to take over the transportation of the sugar bags from various sugar factories and the work of an urgent nature. The respondent was asked to see the appellant No. 2 at Baroda in connection with the contract work of transporting sugar bags from Madhi Sugar Factory. On or about 22/12/1972, the parties agreed over the terms and conditions which were to be formally intimated to the respondent later on if the work was accepted by the respondent. The respondent accepted the work and started it from 25/12/1972. The acceptance was communicated by the respondent on 27/12/1972 in writing. The terms and conditions were finalised by the Regional Manager and were communicated to the respondent under letter dtd. 19/1/1973. These are again confirmed by the appellant

No. 2 under his letter dtd. 22/1/1973 addressed to the respondent. One of the conditions was that the respondent should give a security deposit of Rs. 5000/-. The term regarding loss in transit was also mentioned in these letters. The appellant denied that the said term was superimposed. It is the case of the appellant that the respondent never protested or objected against any of these terms. He carried on and completed the work. According to the appellants the respondent was bound by the terms and conditions laid down in the letter dtd. 19/1/1973 and 22/1/73. The respondent also never objected to the security deposit and has preferred provisional bills of only 90 % of the total payment and obtained payment on that basis. Thus the terms incorporate in these letters are acted upon by the respondent. The sugar bags were weighed in the presence of respondent's representative and ten percent test weighment was done. The weight was also noted on the reverse of the truck receipts brought by the respondent's representative. The sugar bags weighed 10 kg each at the time of loading at Madhi Sugar Factory. The difference between that weight and the weight recorded at the depot of the FCI was the weight which represented the loss in transit for which the respondent is liable under the contract. It was contended that recovery effected from the respondent was towards the loss suffered entirely on account of transit losses. The appellants denied that the beam scale in camp godown was faulty or that representative of the respondent did not sign the weighment sheets on that ground.

5. The learned trial judge, after appreciating and considering the evidence on record, recorded the finding that the respondent has proved that Rs.12133-70 have remained payable by the appellants towards the final bill of the respondent dtd. 27th March, 1973. Eventhough, he has recorded a finding against the respondent that he was liable for the loss in transit as per the terms and conditions of the contract for transporting sugar bags, the learned trial Judge has recorded the finding that the appellants have failed to proved that they are entitled to adjust an amount of Rs. 12960-30 ps. for loss in transit against the dues of the respondent. It is the said judgement and decree, which is under challenge in this appeal.

6. Mr. A.M. Kapadiya, learned advocate appearing for the appellants submitted that the learned trial judge has committed an error in passing the decree in favour of the respondent, eventhough, he has recorded finding in favour of the appellants that the respondent was liable for the

loss in transit, as per the terms and conditions of the contract for transporting the sugar bags. It is further submitted by Mr. Kapadiya that there was a shortage of sugar to the tune of 3 metric tones 410 kgs. and 600 grams and therefore, the respondent is liable to make good this loss at the market rate of sugar, as per the terms and conditions of contract for transporting sugar bags.

7. Having gone through the evidence on record, it appears that the correctness of the bill, submitted by the respondent is not seriously disputed by the appellants. There is no dispute to the fact that the respondent had carried the entire work of transporting the sugar from Madhi Sugar Factory to various FCI Depots in Gujarat. It is also an admitted position that for the loss of one sugar bag in transit, the respondent had shown readiness to reimburse the payment. It is also an admitted position that the weighment was done of 10% weighment basis. The rates at which the respondent had undertaken the contract, is also not in dispute.

8. The respondent has examined himself at Ex. 47 with a view to prove that Rs. 12,133-70 ps. remained due under the final bill submitted by him. Since the parties have given the evidence in conformity with the pleadings, it is not necessary for me to narrate their oral evidence in detail.

9. Reading the evidence of respondent, it is clear that all the bags were delivered intact. It is also clear that the respondent was not cross-examined on the aspect that his total bills were for Rs.1,01,918-70, and he was entitled to recover Rs.12,133-70, which remained due, at the time of submission of final bill. Thus, it is not disputed that the said amount was not due to the respondent. The respondent has been cross-examined as regards his liability for the transit loss, which was caused. According to the appellants, they are entitled to adjust Rs. 12960/- which, according to them was the value of the goods lost in transit. This amount, according to them was rightly adjusted against the outstanding amount of the respondent. To prove the actual loss in transit, the appellants have examined Pavankumar Murajmal Tahiliani at Ex. 76, the Assistant Depot Superintendent in Ahmedabad camp godown and one Y. Anand, the District Manager of FCI, Vadodara and one Govardhan Udham Accountant from the Vadodara Office. The evidence of Pavankumar Murajmal Tahiliani Ex. 76 discloses that the work of unloading at the camp godown was put down by the handling contractor of respondent

M/s. Gujarat Labour Corporation and not by the respondent. He has stated that sugar bags were received by the Ahmedabad camp godown through the respondent from Madhi. He has admitted that the representative of the respondent had refused to sign the weighment sheets on December 26, 1972. He has stated that in the labour gang, there was one labourer known as gangman who was weighing and dictating the weight of the sugar bags. From the perusal of weighment sheets Ex. 80, it appears that they are prepared by one clerk Mr. Parmar and not by Mr. Tahiliani. In the instant case, neither the handling contractor nor the clerk Mr. Parmar has been examined. Mr. Tahiliani has stated that he has no personal knowledge as to what had happened when the goods were loaded at Madhi. Similarly, Mr. Y. Anandan in his evidence Ex. 87 has stated that Mr. Kolhatkar, Quality Inspector, Gr.I and Mr. G.B. Charania, Gr.II were posted in the sugar factory at Madhi to supervise the weighment and load of the sugar bags. Even these two persons are not examined to show that the weighment sheets prepared at Madhi Sugar Factory while loading the goods were correctly prepared.

10. The learned trial judge in his judgement has raised a doubt about the 10% of bags being weighed at Madhi Sugar Factory by observing that the weighment sheets which are produced at Ex. 83 show uniform weight of all the bags to be 100 kg. in sheet Nos. 18101 to 18143. The average net weight per empty bag, in some sheets, is as 1 kg. Thereafter, in Sheet NO. 18145 to 18150, the gross weight of the bag is shown as 101.20 kg. and the net weight of sugar shown in these various sheets is 100 kg. in each bag. In my opinion, the learned trial judge is right in observing that the handling contractor at Madhi and/or Mr. Kalotkar and Mr. Garenia, could have thrown light regarding the weighment done at Madhi Sugar Factory. In absence of their evidence, it is not possible to hold that even 10% of bags were weighed at Madhi Sugar factory. Mr. Govardhan Udham is examined at Ex. 93 who has no personal knowledge about the contents of these weighment sheets. It is to be noted that the representative of the respondent has refused to sign the weighment sheet, on the ground that the respondent had told him not to sign because the weighment scale was faulty.

11. The learned trial Judge has also recorded a point with which I am also in agreement that there was no justification for deducting only 1 kg. for arriving at

the net weight of each bag. Even in other weighment sheet at Ex. 80 it is shown whether the correct weight of gunny bags is deducted from the gross weight to arrive at the net weight. As admitted by Mr. Tahiliani only one kg. is deducted instead of 1.2 kg. from the gross weight so far as the weighment sheet No. 37801 is concerned which relates to 190 bags of sugar. In fact in many of these weighment sheets, the weight of gunny bags does not appear to have been deducted. It is an admitted position that the respondent had not unloaded the goods at Ahmedabad Camp Godown, for that purpose handling contractor of appellant - M/s. Gujarat Labour Corporation, it was therefore, incumbent upon the appellant to produce the relevant weighment sheets in this regard, to reproduce before the court the relevant material from which it could have been ascertained as to what was the actual weight of these goods when they were transported from Ahmedabad camp godown to various other places. In view of the findings of Mr. Taheliani, it is clear that he was not present all through out at the time when the weighment sheet was done of all the goods and the clerk remained present all through out. Thus, it appears that even at the time of preparing the weighment sheets, Mr. Taheliani was not present and It was Mr. Parmar who has signed most of the sheets. The sheets are prepared by the Clerk and the weighment is done by gangman namely handling contractor who was the head of the labour gang. In view of the admission of Mr. Taheliani that if any deficiency is found on 10% test weighment, it is presumed that there is some deficiency in the remaining unweighed bags also. In my opinion, This would be a rather haphazard way to prove the actual loss.

12. The learned trial judge has not agreed with the submission that if any deficiency is found on 10% test weighment, it is presumed that there is some deficiency in the remaining unweighed bags. In my opinion the learned trial judge is rightly so. The content of weighment sheet Ex. 83 which were to the weight of the cargo at the time when it was loaded at Madhi are also not proved by the evidence of the persons who have prepared them and who supervised the loading operations. Considering the above said aspect of the matter, I am of the view that the appellants have not proved the extent of the actual loss in transit and subsequently, it is not proved that they were entitled to adjust the amount of Rs. 12,960-30 ps. on that account against the dues of the respondent. In this view of the matter, I am clearly of the view that the respondent has established that the amount of Rs. 12133-70 was due to him under the final bill.

13. In view of the above discussion, I see no merit in the appeal and same is dismissed with costs.

Rafik*